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Supreme Court of the United States

October Term, 1995

WILLIAM DAUBERT AND JOYCE DAUBERT,
INDIVIDUALLY AND AS GUARDIANS AD LITEM
FOR JASON DAUBERT, AND ANITA DE YOUNG,
INDIVIDUALLY AND AS GUARDIAN AD LITEM
FOR ERIC SCHULLER,

Petitioners,

v.

MERRELL DOW PHARMACEUTICALS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Merrell advances six meritless objections to a grant of certiorari, conveniently ignoring most of the authorities cited in the petition. Review should be granted to resolve the confusion and conflict over the proper construction of Rule 56(c), so that this important rule of civil procedure will be applied consistently throughout the nation.

1. Merrell argues that review should be denied because "[t]his Court denied certiorari last year on the identical issue" in another case, *Elkins v. Richardson-Merrell, Inc.*, 8 F.3d 1068 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1299 (1994). Opp. at 9. Ironically, Merrell made the same argument in unsuccessfully urging this Court to deny our last petition, concerning the circuit conflict over the *Frye* rule (on which this Court had recently denied review in *Christophersen v. Allied-Signal Corp.*, 503 U.S. 912 (1992)). *See* Respondent's Brief in Opposition, No. 92-102, at 1 & n.1. Again, Merrell "ignores that '[t]he denial of a writ of certiorari imports no expression upon the merits of the case, as the bar has been told many times,' *United States v. Carver*, 260 U.S. 482, 490 (1923)."[1] Moreover, the analysis of the circuit conflict and of the need for review contained in the petition and in this reply brief is much more comprehensive than the analysis in the *Elkins* petition, and we have offered significant additional authorities on the circuit conflict that were published after review was denied in *Elkins*.

2. Merrell simply asserts, without offering any citations, that there are no "meaningful, outcome-determinative differences" among the circuits over what initial burden, if any, Rule 56(c) imposes on a moving party that seeks summary judgment on the

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[1] Reply to Brief in Opposition, No. 92-102, at 1 n.1. *See also Missouri v. Jenkins*, 115 S. Ct. 2038, 2047 (1995) (reiterating *Carver* rule); *Brown v. Allen*, 344 U.S. 443, 491-92 (1953) ("We have repeatedly indicated that a denial of certiorari means only that, for one reason or another which is seldom disclosed, and not infrequently for conflicting reasons which may have nothing to do with the merits and certainly may have nothing to do with any view of the merits taken by a majority of the Court, there were not four members of the Court who thought the case should be heard.").

ground that the non-moving party cannot prove its case. Opp. at 9. Merrell largely ignores our extensive citation of authorities demonstrating the conflict. Pet. at 7-12 & n.15. In particular, Merrell ignores explicit statements by the Fifth and Eleventh Circuits noting that *Celotex* is commonly misunderstood and misapplied by most courts. *See* Pet. at 10.[2] Merrell also ignores the analysis by numerous scholars of the confusion over Rule 56(c). Pet. at 7 & n.15. Finally, Merrell ignores our discussion of the source of the confusion: the unclear language in the *Celotex* plurality opinion, first noted by three of the *Celotex* justices. *See* Pet. at 9, 12.

Obviously, the confusion over Rule 56(c) perceived by all these justices, courts and commentators is not something that petitioners have invented. The most recent example of the conflict among the circuits over Rule 56(c) can be found in the second edition of a leading casebook on civil procedure, published after the petition was filed in this case. The casebook describes the conflict over Rule 56(c) in substantially the same manner as does the petition, citing some of the same cases (including the *Elkins* case that Merrell so casually dismisses):

> The majority of post-*Celotex* lower courts have read that decision not to impose a significant triggering burden on a movant who lacks the burden of production at trial. Indeed, many lower court decisions following *Celotex* have either reduced the burden dramatically or ignored it completely. *See, e.g.*, *Elkins v. Richardson-Merrell, Inc.*, 8 F.3d 1068 (6th Cir. 1993); *Whetstine v. Gates Rubber Co.*, 895 F.2d 388 (7th Cir. 1990); *Kauffman v. Puerto Rico Telephone Co.*, 841 F.2d 1169 (1st Cir. 1988). *But see Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991). *See also Russ v. International Paper Co.*, 943 F.2d 589, 591 (5th Cir. 1991).

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[2] Given these explicit Fifth and Eleventh Circuit criticisms of the majority approach to Rule 56(c), it is simply incomprehensible for Merrell to claim that petitioners "are unable to quote any court of appeals decision that states that it has a standard in meaningful conflict with the standards of another circuit." Opp. at 9 n.7.

Richard L. Marcus, Martin H. Redish & Edward F. Sherman, CIVIL PROCEDURE: A MODERN APPROACH 421 (2d ed. 1995) (quotations from, and analysis of, *Clark* and *Russ* omitted). The casebook also cites two of the same articles cited in the petition (Pet. at 14 n.20) that criticize the inefficient and unfair nature of the majority rule. *Id.* at 423.[3] Clearly, the Rule 56(c) issue that we have presented is a real issue, and one worthy of review.

3. Alternatively, Merrell argues that, even if we are correct that a conflict over Rule 56(c) exists, that conflict "is patently illusory in this case." Opp. at 10. In answer to our argument that "[i]f the approach followed by the Fifth, Seventh, Tenth and Eleventh Circuits had been applied, as a matter of law Merrell's summary judgment motion would have been denied," Pet. at 15, Merrell insists that this simply is not so. Merrell asserts that the petition ignores "all but one of the exhibits accompanying Merrell Dow's motion." Opp. at 10. Although the petition *does* address the other exhibits, *see* Pet. at 6 n.12, they merit little attention (notably, Merrell did not cite them in any of the three briefs it filed below on remand). These exhibits are simply not among the material listed in Rule 56(c) that could be a proper basis for Merrell's summary judgment motion under the law of the Fifth, Seventh, Tenth and Eleventh Circuits.[4] Because Merrell produced no Rule 56(c) materials in support of its motion, its argument that it nevertheless met the standard for Rule 56(c) set out by these four circuits cannot prevail. As we have demonstrated through specific citations, *see* Pet. at 10-11

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[3] Obviously, not every casebook and treatise on federal civil procedure discusses the conflict among the circuits over Rule 56(c). For example, Merrell cites two civil procedure treatises that do not discuss the conflict, Opp. at 9-10 n.7, whose volumes on Rule 56(c) were published before *Celotex* (the pocket parts cite post-*Celotex* law review articles concerning the debate over the proper construction of Rule 56(c)).

[4] *See* Opp. at 3-4 n.3 (listing all exhibits to Merrell's motion, confirming the description in the petition that, except for Dr. Lamm's affidavit, they "were not Rule 56(c) materials showing that Bendectin does not cause birth defects; indeed, they were almost exclusively copies of decisions by other courts in other Bendectin cases," Pet. at 6 n.12).

and nn. 17 & 18, each of these circuits holds that a summary judgment motion must be supported by reference to specific portions of the record material listed in Rule 56(c).

4. Given that its motion was unsupported by any of the material listed in Rule 56(c), Merrell advances two last-ditch arguments in defense of its suggestion that its Rule 56(c) motion was proper under the law of the Fifth, Seventh, Tenth and Eleventh Circuits, so that the conflict in the circuits is supposedly not presented by this case.

Merrell argues first that its motion rested not simply on a "naked assertion" that petitioners could not prove their case, but rather on a summary judgment brief, written by its counsel, "explaining in detail, both in its own discussion and through the attached judicial opinions, the substance of the causation testimony of petitioners' expected experts and why it was scientifically inadequate." Opp. at 12-13. But there is no basis for believing that the Fifth, Seventh, Tenth or Eleventh Circuits would hold that a movant can meet its Rule 56(c) burden based on assertions in the briefs of counsel. *See* Pet. at 9-11; *see also* 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2723, at 64 (1983) ("Wright, Miller & Kane") ("summary judgment cannot be granted on the basis of statements of fact in the moving party's brief even though they are uncontroverted by an opponent"). Nor is there any support for the idea that these circuits would permit a party to meet its Rule 56(c) burden simply by attaching to its motion the decisions of other courts in other cases considering challenges to other (supposedly similar) evidence, without including any record excerpts from those cases.[5]

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[5] *See, e.g.*, Wright, Miller & Kane, *supra*, § 2723, at 67-68 ("When the judge takes judicial notice of the record of another action on a Rule 56 motion, he must inform the parties of the precise portion of the record he is noticing and give them an opportunity to react to his action"); *Schertz v. Waupaca Cty.*, 875 F.2d 578, 581 (7th Cir. 1989) (cited in Pet. at 11) (noting that in moving for summary judgment based on prior case, defendants submitted transcripts from the other case, and thereby "met their initial burden" under Rule 56(c)).

The pitfalls of any construction of Rule 56(c) that would permit a movant to meet its burden simply by referring to testimony reviewed in other court

Merrell's second, even more desperate argument is that under the law of these four circuits it could be deemed to have met its Rule 56(c) burden *after* it filed its motion, because "the evidentiary material before the district court increased substantially" when petitioners filed their Rule 56(e) materials, and "[t]he record expanded further" when Merrell submitted materials attacking petitioners' Rule 56(e) filing, so that *after* all these materials were filed, there was supposedly "affirmative admissible evidence supporting Merrell Dow's motion on causation." Opp. at 13. To describe this argument is to refute it. As made clear by the plain language of Rule 56, and as settled by this Court long ago, if Merrell's initial Rule 56(c) showing was inadequate, petitioners had no obligation even to respond to the motion. Pet. at 12-13. There is no basis in the law of the Fifth, Seventh, Tenth and Eleventh Circuits for

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decisions, without attaching that testimony to the motion, are amply demonstrated by the three decisions that were discussed in Merrell's 1989 summary judgment brief and which Merrell cites to this Court as having involved a record "no different" from the one in this case. Opp. at 2-3 n.2, 6. As petitioners established below without dispute, Merrell's victory in its "lodestar case — *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 882 (1989) (relied on by all other cases cited by Merrell) —" depended on "peculiar facts" and "rested on a statement by the plaintiffs' key witness 'that the data underlying his opinion was not of a type reasonably relied on by experts in the field'; the D.C. Circuit emphasized that any broader reading 'reflects a misunderstanding of *Richardson*,' where 'the expert himself conceded' lack of reasonable reliance. *Ambrosini v. Labarraque*, 966 F.2d 1464, 1468-69 (D.C. Cir. 1992)." Supplemental Brief on Remand of Plaintiffs-Appellants, filed Sept. 7, 1993, at 12-13 n.9. Merrell's second case, *Lynch v. Merrell-Nat'l Lab.*, 830 F.2d 1190 (1st Cir. 1987), provides even less of a point of comparison; Merrell won summary judgment in *Lynch* on admissibility grounds by default, after the plaintiff failed to submit *any* Rule 56(e) materials in response to Merrell's motion. Merrell's third and final case is completely inapposite because it turned not on the admissibility of plaintiffs' evidence under the Federal Rules of Evidence, but on its sufficiency under substantive Texas law. In *Brock v. Merrell Dow Pharmaceuticals, Inc.*, 874 F.2d 307 (5th Cir.), *modified*, 884 F.2d 166 (5th Cir. 1989), *cert. denied*, 494 U.S. 1046 (1990), the Fifth Circuit found the available evidence on Bendectin insufficient to establish causation under Texas law, a finding that has since been rejected by the Texas courts. *Merrell Dow Pharmaceuticals, Inc. v. Havner*, No. 13-92-540-CV (Tex. App. Ct., 13th Dist., Aug. 10, 1995) (en banc) (upholding finding that Bendectin caused child's birth defects).

Merrell's "expanding record" theory of Rule 56(c), under which a non-movant never receives notice of the grounds on which summary judgment is being sought, and of what Rule 56(c) material must be countered, but is instead confronted with a moving target. *E.g.*, *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1310 (7th Cir. 1989) ("When a party moves for summary judgment on ground A, his opponent is not required to respond to ground B — a ground that movant might have presented but did not.").

5. Merrell argues that "petitioners waived their present claim" through a "failure to raise [the Rule 56(c)] point in a timely manner." Opp. at 14 n.10. This argument is so groundless that Merrell did not even raise it below. As previously summarized (Pet. at 3 & n. 4), but ignored by Merrell, upon remand of this case *Merrell itself* asked the Ninth Circuit to apply the new construction of Rule 702 announced by this Court. Merrell specifically noted that this Court's decision announced "new standards," requiring the application of "scientific standards for validation" of an expert's methodology.[6] Obviously, the Ninth Circuit was required to apply these new standards in evaluating the evidence proffered by *all* parties in this case. Petitioners promptly requested that the Ninth Circuit apply these new standards to Merrell's Rule 56(c) submission, arguing that the only Rule 56(c) material submitted by Merrell (Dr. Lamm's affidavit) did not meet the new standards, so that Merrell had not met its threshold burden. *See* Pet. at 4. In any event, because petitioners' argument concerning the proper construction of Rule 56(c) was passed on below, the issue is properly before this Court. *See, e.g.*, *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995).

6. Finally, Merrell argues that, even though the Ninth Circuit assumed that Dr. Lamm's affidavit is inadmissible (as petitioners demonstrated in their briefs and as Merrell did not

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[6] Motion of Appellee Merrell Dow for Leave to File Supplemental Brief on Remand, filed July 22, 1993, at 2, 4.

contest below, *see* Pet. at 4-6), review should be denied because Dr. Lamm's affidavit is admissible after all. Opp. at 14 n.10. But the affidavits submitted by petitioners establish that Dr. Lamm's methodology is scientifically invalid under this Court's *Daubert I* analysis, *see* Pet. at 4 n.6, and there is no evidence in the record to the contrary. (Dr. Lamm does not make even a bare assertion that his chosen methodology, that of reaching a final conclusion about the safety of Bendectin while ignoring three out of four kinds of pertinent scientific data, is scientifically valid).

* * *

A final consideration weighing heavily in favor of setting aside Merrell's factual quibbles, and granting certiorari to resolve the conflict over the proper construction of Rule 56(c), arises from the peculiar tendency of this issue to evade review by this Court, despite its importance and despite the distinct conflict among the circuits.

Defendants in the Fifth, Seventh, Tenth and Eleventh Circuits will *never* be able to obtain review in this Court to protest that those circuits are reading Rule 56(c) too stringently, and are improperly requiring summary judgment movants to meticulously set out Rule 56(c) materials demonstrating that the non-movant cannot prevail at trial. Where a summary judgment motion is denied as inadequate under Rule 56(c), appellate review is barred because "the denial of a motion for a summary judgment . . . is strictly a pretrial order that decides only one thing — that the case should go to trial." *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966). For that reason, "the denial of a motion for summary judgment is not reviewable on an appeal from a final judgment entered after a full trial on the merits." *Locricchio v. Legal Services Corp.*, 833 F.2d 1352, 1359 (9th Cir. 1987).[7]

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[7] This appears to be the uniform rule in the federal courts of appeals; indeed, in his *Locricchio* opinion Judge Sneed noted that "[a]fter considerable research, we have found no case in which a jury verdict was overturned

In the other circuits, which impose little or no burden on summary judgment movants, plaintiffs will almost never be procedurally positioned to raise in this Court their objection to the majority construction of Rule 56(c). The central vice of the majority rule, from both an efficiency and a fairness perspective, is that it puts plaintiffs to the burden of collating and setting out their entire case, in written form, based on a relatively cursory, unfocused motion by the defendant, thereby allowing defendants to use summary judgment practice as a tool for harassment. *See* Pet. at 13-14 & n.20. No matter how incorrect the construction of Rule 56(c) that permits such poorly supported motions to be considered, and that imposes this burden on plaintiffs, once plaintiffs have borne their burden, and have managed to defeat a poorly supported motion, they will have nothing to appeal. Only in rare cases like this one, in which the poorly supported motion is nonetheless granted, and in which the stakes are high enough to warrant a vigorous effort to obtain review in this Court, will this Court ever have an opportunity to review the Rule 56(c) issue.

The unavailability, in almost all cases, of appellate review of the conflict over Rule 56(c) highlights the need for this Court to grant certiorari in the instant case. If Merrell is right about the proper construction of Rule 56(c), then defendants in four circuits are currently being put to an unauthorized, inefficient and unfair burden in moving for summary judgment, and are having adequately supported motions denied in a manner that is completely unreviewable. If petitioners are right about the proper construction of Rule 56(c), then plaintiffs in most circuits are currently being put to an unauthorized, inefficient and unfair

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because summary judgment had been improperly denied." 833 F.2d at 1359. *See also Watson v. Amedco Steel, Inc.*, 29 F.3d 274, 276-77 (7th Cir. 1994); *Black v. J. I. Case Co.*, 22 F.3d 568, 571-72 (5th Cir.), *cert. denied*, 115 S. Ct. 579 (1994); *Johnson Int'l Co. v. Jackson Nat'l Life Ins. Co.*, 19 F.3d 431, 434 (8th Cir. 1994); *Lama v. Borras*, 16 F.3d 473, 476 n.5 (1st Cir. 1994); *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1250-51 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1417 (1993); *Lum v. City of Honolulu*, 963 F.2d 1167, 1170 & n.1 (9th Cir.), *cert. denied*, 113 S. Ct. 659 (1992); *Jarrett v. Epperly*, 896 F.2d 1013, 1016 (6th Cir. 1990); *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1573 (Fed. Cir. 1986), *cert. dismissed*, 479 U.S. 1072 (1987).

burden to respond to inadequately supported summary judgment motions in a manner that is almost entirely unreviewable. Granting review in this case will guarantee that Rule 56(c) will be applied consistently to all litigants throughout the nation, in a clear manner that will facilitate efficient trial practice, regardless of which construction this Court wishes to place on Rule 56(c).

CONCLUSION

For all these reasons, the petition should be granted.

Respectfully submitted,

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